23

(2)

No. 08-1013

FILED
MAR 4 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

IREANE KELLOGG,
Petitioner,

v.

ENERGY SAFETY SERVICES, INC.
d/b/a OILIND SAFETY, an Arizona Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

CATHERINE MACPHERSON, OF COUNSEL
Counsel of Record
THOMAS A. THOMPSON
MACPHERSON, KELLY & THOMPSON, LLC
616 WEST BUFFALO STREET
BOX 999
RAWLINS, WY 82301
PH: 307-324-2713

Counsel for Respondent

March 12, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether Petitioner has presented compelling reasons for this Court to grant the Petition for Writ of Certiorari where:

A. The decision of the Tenth Circuit Court of Appeals, which held that driving, itself, is not a major life activity under the Americans with Disabilities Act, does not conflict with a decision of any other United States court of appeals concerning the same matter;

B. Petitioner has not demonstrated that the Tenth Circuit's decision implicates an important question of federal law that has not been settled, but should be, by this Court; and

C. Petitioner has not demonstrated that the Tenth Circuit's decision implicates an important federal question in a way that conflicts with relevant decisions of this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Energy Safety Services, Inc., d/b/a Oilind Safety, an Arizona Corporation, does not have a parent corporation, and there is no publically held company that owns ten percent (10%) or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 6

I. The Tenth Circuit Court of Appeals determined that driving, in and of itself, is not a major life activity under the ADA. This decision does not conflict with the decision of any other United States court of appeals on the same matter. .. 6

A. The Tenth Circuit's Decision in this Case. . 6

B. Decisions in Other United States Courts of Appeals. 9

C. Other Jurisdictions. 13

II. The Tenth Circuit's decision is consistent with this Court's opinion in *Toyota Motor Mfg., Ky., Inc. v. Williams.* 17

III. The Tenth Circuit's opinion is consistent with the law in effect at the time of the alleged discrimination against Petitioner and is consistent with the newly adopted, though not applicable, ADA Amendments of 2008. 19

CONCLUSION 20

TABLE OF CITED AUTHORITIES

CASES

Acevedo Lopez v. Police Department of Puerto Rico,
81 F.Supp. 2d 293 (D.P.R. 1999) 13

Anderson v. North Dakota State Hospital,
232 F.3d 634 (8th Cir. 2000) 13

Arnold v. County of Cook,
220 F.Supp. 2d 393 (N.D. Ill. E. Div. 2002) .. 14

Berry v. T-Mobile USA, Inc.,
490 F.3d 1211 (10th Cir. 2007) 16

Best v. Shell Oil Co.,
107 F.3d 544 (7th Cir. 1997) 9

Chenoweth v. Hillsborough County,
250 F.3d 1328 (11th Cir. 2001) 7, 9, 10

Colwell v. Suffolk County Police Dept.,
158 F.3d 635 (2nd Cir. 1998) 7, 9, 11, 12, 13

Endlich v. Yellow Corp.,
No. 05-2215, 2006 WL 1520177 (10th Cir. June 2, 2006) (unpublished) 14, 15

Holt v. Grand Lake Mental Health Ctr., Inc.,
443 F.3d 762 (10th Cir. 2006) 8, 17

Kealy v. Consolidated Edison Co. of N.Y.,
No. 98 Civ. 2210 (MGC), 2002 WL 1552027 (S.D.N.Y. July 15, 2002) 13

Kellogg v. Energy Safety Services, Inc.,
544 F.3d 1121 (10th Cir. 2008) 6, 9, 17, 18

Norris v. Allied-Sysco Food Services, Inc.,
948 F.Supp. 1418 (N.D. Cal. 1996) 15

Regional Economic Community v. City of Middletown,
294 F.3d 35 (2nd Cir. 2002) 11, 12

Ryan v. Grae & Rybicki, P.C.,
135 F.3d 867 (2nd Cir. 1998) 12

Sacay v. Research Foundation of City University of New York,
193 F.Supp. 2d 611 (E.D.N.Y. 2000) 13

Toyota Motor Mfg., Ky., Inc. v. Williams,
534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) 11, 12, 17, 18

Yindee v. Commerce Clearinghouse, Inc.,
No. 04 C 0730, 2005 WL 1458210 (N.D. Ill. June 16, 2005) (unpublished) 14

STATUTES

42 U.S.C. § 12102(2) 1

42 U.S.C. 12102(2)(A) 7, 20

42 U.S.C. 12102(2)(B 7, 20

42 U.S.C. § 12112 5

ADA Amendments Act of 2008, Pub.L.No. 110-325, Sept. 25, 2008 20

RULES

Sup. Ct. R. 10 21

REGULATIONS

24 C.F.R. § 100.201(b) 12

28 C.F.R. § 41.31(b)(2) 12

29 C.F.R. § 1630.2(i) 1, 7, 10

29 C.F.R. § 1630.2(j)(3)(I) 9

45 C.F.R. § 84.3(j)(2)(ii) 12

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

42 U.S.C. § 12102(2) [Americans with Disabilities Act of 1990] was in effect at the time this matter arose, and provides as follows:

> DISABILITY–the term "disability" means, with respect to an individual–
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual. . . .

29 C.F.R. § 1630.2(i):

> Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

STATEMENT OF THE CASE

Energy Safety Services, Inc., d/b/a/Oilind Safety [Oilind] is an industrial safety company with sixteen offices located in ten states. Four of the offices, including the one located in Worland, Wyoming, where Petitioner Kellogg worked, provided safety-related services to oilfield facilities. (Record, TR Vol. V at 953) Those safety-related services included environmental monitoring; safety consulting, training, and supervision; sale of safety supplies, clothing, and equipment; servicing and repairing safety equipment, safety air packs, and respirators/air breathing apparatuses used by customers' employees to protect

against exposures to toxic or hazardous environmental substances. (Record, TR Vol. VII at 974)

Ms. Kellogg was hired by Oilind in June, 2004, as a safety technician/supervisor. The skills, qualifications, and duties were set forth in job descriptions. (Record, TR Vol. VII at 1181;1185) Oilind's vehicles were registered with the United States Department of Transportation ("DOT") as commercial vehicles. (Record, TR Vol. IV at 625) A safety technician/supervisor was required to hold a valid commercial driver's license (CDL) with hazardous materials (HazMat) endorsement. (Record, TR Vol. VII at 1181; 1185) Safety technicians/supervisors were required to drive from the Oilind shop in Worland in a company vehicle to customers' work sites in the oilfield. (Record, TR Vol. II at 354) Travel typically required up to two hours, one way, to the site and up to two hours to return after completing work at the site. (Record, TR Vol. II at 282, 355; Vol. VI at 982) Safety technicians/supervisors, including Kellogg, on occasion, pulled a trailer with a compressed air tank; compressed air tanks are considered a hazardous material by DOT. Kellogg and other safety technicians/supervisors were required to maintain DOT driver's logs of driving and working time. (Record, TR Vol. II at 343-44; 412)

Kellogg, on occasion, worked in Oilind's shop in Worland. The work performed in the shop involved repairing, sanitizing and recharging (with compressed air) the safety air packs and breathing respirators which were used by customers' employees to protect against exposure to toxic or hazardous environmental substances. Once these tasks were completed, the air

canisters were marked with Oilind's DOT stamp and numbers certifying the work had been performed in conformity with the applicable DOT [pipeline] regulations. (Record, TR Vol. II at 407; 425-27; 466) The position in the shop was considered a "safety-sensitive position," and Oilind was required to comply with DOT pipeline regulations in performing these functions and services in the shop. (Record, TR Vol. V at 953-55) The DOT requirements regarding qualifications and DOT Medical Advisory Criteria applicable to holders of CDL's were also applied by Oilind to those performing "safety-sensitive" tasks in the shop. (Record, TR Vol. V at 953)

There were no concerns with regard to Kellogg's employment until January, 2005. Kellogg came to work on Friday, January 21, believing it was Thursday, January 20. She did not recall or know she missed work the previous day. (Record, TR Vol. II at 322; 449) Kellogg sought medical treatment, reporting a history of several similar episodes in recent months, and reporting episodes of vertigo which lasted for several minutes. (Record, TR Vol. II at 447-48, 488)

On January 23, 2005, Kellogg was treated at the emergency room in Worland and transferred to a hospital in Billings, Montana, where she was treated by Dr. Echeverri. (Record, TR Vol. V at 822) Dr. Echeverri discharged Kellogg on January 25 with a restriction not to drive. (Record, TR Vol. V at 827) On January 31, Dr. Echeverri issued a note that Kellogg had recovered sufficiently to return to work, but with the restriction of no driving until she was seen again by him. (Record, TR Vol. V at 828) On February 14, Dr. Echeverri opined Kellogg was suffering from complex partial seizures, a form of epilepsy, and

placed her on anti-convulsion medication. Dr. Echeverri provided Kellogg with a note that she was released to work, but still restricted from driving until her medications were under control. (Record, TR Vol. V at 823, 830, 844) Dr. Echeverri testified he intended to continue to treat Kellogg in order to monitor her medication, but she never returned after February 14. Dr. Echeverri did not provide a release for Kellogg to drive on the medication he had prescribed. (Record, TR Vol. V at 833-34; 844-45)

Kellogg testified that Dr. Echeverri provided her with an additional note sometime in March, 2005, which continued to restrict her from operating a vehicle under her CDL licence with HazMat endorsement. (Record, TR Vol. III at 461-62, 508-09) Kellogg provided Oilind with copies of the doctor notes restricting her from driving. (Record, TR Vol. II at 329, 331, 333, 335-37; Vol. III at 456-58)

Kellogg continued to drive her personal motor vehicle, despite the doctor's restriction of no driving. (Record, TR Vol. III at 500-01) Oilind could not, and did not, allow Kellogg to drive on its behalf or in a company vehicle because of the doctor's restrictions. Both Kellogg's and Oilind's employment experts testified at trial that Kellogg was not qualified to perform the essential functions of the safety technician/supervisor position because of the doctor's restrictions which prevented Kellogg from driving. (Record, TR Vol. IV at 781, 783-84; Vol. V 901-03)

During this time period, Kellogg expressed to Aaron Chamberlain, manager of Oilind's Worland office, that she wanted to work in the shop. (Record, TR Vol. II at 333-34) Chamberlain wanted to put her

to work, but was unable to place her in the shop because the work performed there was considered "safety-sensitive" under the DOT pipeline regulations. (Record, TR Vol. II at 380) There were no vacant positions in the Worland shop, or office generally, and it was impractical and created an undue hardship for Oilind to hire a new employee to transport Kellogg to the customers' work sites. (Record, TR Vol. II at 378)

On May 5, 2005, Oilind sent Kellogg a letter requesting she update it as to her status and when she intended to return to work as safety technician/supervisor. (Record, TR Vol. VII at 1213) Kellogg did not provide any information as requested. (Record, TR Vol. III at 507) At the end of May, 2005, Oilind terminated Kellogg's employment, but continued to pay the premiums on her life and disability insurance until December, 2005. (Record, TR Vol. III at 465; Vol. V at 880)

Kellogg brought suit against Oilind in May, 2006, in the United States District Court for the District of Wyoming. Kellogg asserted a number of claims, including discrimination under the Americans with Disabilities Act [of 1990], 42 U.S.C. § 12112. During the course of that case, the District Court denied Oilind's Motion for Summary Judgment, in pertinent part, finding that driving, in and of itself, was a major life activity under the ADA. (Record, Vol. I at 32-34)

The matter was tried to a jury in August, 2007. Over the objection of Oilind, the District Court instructed the jury, in three separate instructions, that driving is a major life activity under the ADA. (Record, TR Vol. VI at 1052) The District Court also denied Oilind's motion for judgment as a matter of law on the

same legal basis. (Record, Vol. I at 181-82) An appeal to the Tenth Circuit Court of Appeal ensued. That Court, by a majority decision, consistent with decisions from other courts of appeals, held that driving, itself, is not a major life activity under the Americans with Disabilities Act.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit Court of Appeals determined that driving, in and of itself, is not a major life activity under the ADA. This decision does not conflict with the decision of any other United States court of appeals on the same matter.

A. The Tenth Circuit's Decision in this Case.

The Tenth Circuit, applying the Americans with Disabilities Act of 1990, acknowledged that the first element of a discrimination claim under the ADA is proof that the plaintiff has a qualifying "disability" under the statute:

> The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C.A. 12102(2).

Kellogg v. Energy Safety Services, Inc., 544 F.3d 1121, 1124 (10th Cir. 2008)

The Tenth Circuit noted at pages 1124-25, that the term "major life activities" is not defined in the

statute[1], but a regulation promulgated by the Equal Employment Opportunity Commission defined it as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

Having addressed these preliminary requirements and definitions, the Tenth Circuit addressed the specific issue of whether driving, itself, is a major life activity under the ADA, a question of first impression in the Tenth Circuit. The Tenth Circuit noted two other circuits had published opinions on the question, and those two circuits had concluded that driving, itself, is not a major life activity under the ADA. The Tenth Circuit cited to *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2nd Cir. 1998) and *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329-30 (11th Cir. 2001).

In reaching its decision, the Tenth Circuit stated:

> . . . Although driving is not one of the listed activities in the EEOC regulation, that does not end the inquiry because the regulation does not purport to give an exhaustive list.
>
> It cannot be disputed that driving is an extremely important daily activity to many, even most, adults. Without the ability to drive, it may be very difficult to care for oneself or to work. Indeed, we have recognized that the

---

[1] The ADA Amendments Act of 2008 does contain a statutory definition of "major life activities." 42 U.S.C. 12102(2)(A) and (B).

activity of "[c]aring for one's self encompasses normal activities of daily living; including . . . driving. . . ." *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 767 (10th Cir. 2006) (internal quotation marks omitted). But driving is, literally, a means to an end. The activities enumerated by the EEOC–"caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" –are all profoundly more important in and of themselves than is driving. There are those who drive just for the pleasure of it ("Hey, let's go for a ride"), but that practice is declining and some would now consider it unpatriotic. Moreover, the importance of the enumerated activities is not dependent on where one lives; they are valued as much by the resident of a major metropolitan area as by an isolated rural resident. Driving, in contrast, may be a minor concern for one who is near convenient mass transit and can walk to work.

To conclude, as did the district court, that driving is a major life activity because of its importance to the performance of other major life activities, such as caring for oneself or working, would short circuit the analysis in determining whether one of these major life activities had been substantially limited. For instance, to show a substantial limitation in the major life activity of working, the plaintiff must, under the EEOC regulations, establish a "significant[] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training,

> skills and abilities." 29 C.F.R. 1630.2(j)(3)(I). Undoubtedly, an inability to drive will sometimes enable the plaintiff to meet this standard. *See Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997). Likewise, a restriction on driving could cause one to be substantially limited in the activity of caring for oneself. But a plaintiff should not be permitted to bypass having to prove substantial limitations in these major life activities by providing only evidence that she cannot drive.
>
> *Kellogg, supra* at 1125-26.

The Tenth Circuit held "that driving was not itself a major life activity." *Kellogg, supra* at 1126. The Court set aside and vacated the jury verdict on the ADA claim because the jury had been improperly instructed on the law, and it was impossible to know whether the jury based its verdict on just the legally incorrect ground due to the nature of the verdict form.

B. Decisions in Other United States Courts of Appeals.

The Tenth Circuit made note of the two circuits which had already decided driving, itself, is not a major life activity under the ADA: *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329-30 (11th Cir. 2001) and *Colwell v. Suffix County Police Department*, 158 F.3d 635, 643 (2nd Cir. 1998).

The Eleventh Circuit's decision in *Chenoweth* contains the most complete analysis and explanation of why driving is not, and should not be, a major life activity under ADA. The *Chenoweth* case involved the

following: Chenoweth was a registered nurse; she suffered a seizure and was diagnosed as having focal onset epilepsy. Her doctor prescribed medication (Lamictal) and advised her, among other things, not to drive at all until she had gone six months without experiencing a seizure. Chenoweth brought an action against her employer alleging various claims, including claims under ADA. Summary judgment was granted in favor of the employer on ADA. Chenoweth appealed, asserting that driving was a major life activity which entitled her to an accommodation. The Eleventh Circuit disagreed stating that major life activities as enumerated by the EEOC regulations are functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. §1630.2(i).

The *Chenoweth* Court stated, at 1329-30:

> . . .Although this enumeration is not exhaustive, driving is not only absent from the list but is conspicuously different in character from the activities that are listed. It would at least be an oddity that a major life activity should require a license from the state, revocable for a variety of reasons including failure to insure. We are an automobile society and an automobile economy, so that it is not entirely farfetched to promote driving to a major life activity; but, millions of Americans do not drive, millions are passengers to work and deprivation of being self driven to work cannot be sensibly compared to inability to see or to learn. (Emphasis added.) (Citations omitted.)

The *Colwell* case was decided by the Second Circuit. That Court generally discussed the ADA and the major life activities which are listed in the EEOC regulations. The Second Circuit held, at page 643, that driving was not a major life activity under the ADA.

At page 18 of her brief, Petitioner cites to *Regional Economic Community v. City of Middletown*, 294 F.3d 35 (2nd Cir. 2002) and states to this Court that *Regional* is a "more recent 2nd Circuit opinion which found to the contrary" of the *Colwell* decision on the issue of whether driving, itself, is a major life activity under the ADA. Reviewing the *Regional* decision in its entirety, and that portion cited in the Petitioner's brief, it is submitted that this is a misstatement of the law and of what the Second Circuit said in *Regional*.

In *Colwell*, *supra*, at 643, the Second Circuit expressly held, though not eloquently, that driving is not a major life activity under ADA. In *Regional*, the Second Circuit was not discussing or deciding whether driving, itself, was a major life activity. The Second Circuit's discussion and decision dealt with an entirely different issue, specifically, the recognized major life activity of "caring for one's self," and what kinds of normal daily activities of living were encompassed within that recognized major life activity. In *Regional*, the Second Circuit stated, at page 47:

> As the Supreme Court recently observed, "[T]o be substantially limited . . ., an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of *central importance to most people's daily lives." Toyota Motor Mfg., Ky., Inc. v.*

> *Williams,* 534 U.S. 184, 122 S.Ct. 681, 691, 151 L.Ed.2d 615 (2002). The impairment's impact must also be "permanent or long-term." *Id.* Major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. 41.31(b)(2); 45 C.F.R. 84.3(j)(2)(ii); 24 C.F.R. 100.201(b). The function of "caring for one's self," we have held, "encompasses normal activities of daily living; including feeding oneself, driving, grooming, and cleaning home." *Ryan v. Grae & Rybicki, P.C.,* 135 F.3d 867, 871 (2d Cir 1998)(citing *Dutcher v. Ingalls Shipbuilding,* 53 F.2d 723, 726 (5th Cir. 1995)). *Williams* confirms that such "tasks central to most people's daily lives" constitute major life activities. 122 S.Ct. at 693. (Emphasis added.)

The decision in *Regional* was not contrary to the *Colwell* decision, and does not conflict with the decision of the Tenth Circuit. The Tenth Circuit decision described exactly what *Regional* says: that a restriction in driving could cause one to be substantially limited in the activity of caring for oneself, and that the inability to drive is evidence of, and part of the analysis (under *Toyota),* when determining whether one of the major life activities has been substantially limited by a physical or mental impairment.

The Second, Tenth, and Eleventh Circuits' decisions concerning the specific issue of whether driving, itself, is a major life activity are not in conflict. Petitioner has presented no decisions from

other courts of appeals which are in conflict with the Tenth Circuit's decision.[2]

C. Other Jurisdictions.

The United States courts of appeals have been consistent in the manner in which they have resolved the issue of whether driving, itself, is a major life activity under the ADA. Federal district courts (except for the Wyoming District Court from which this case arose) when asked, have also held that driving is not a major life activity under the ADA. Those cases include: *Sacay v. Research Foundation of City University of New York*, 193 F.Supp. 2d 611, 627 (E.D.N.Y. 2000)(citing *Colwell, supra at 643)*; *Kealy v. Consolidated Edison Co. of N.Y.*, No. 98 Civ. 2210 (MGC), 2002 WL 1552027 at *5 (S.D.N.Y. July 15, 2002) (unpublished)(citing *Colwell, supra,* and stating that the Second Circuit has explicitly rejected the argument that driving, by itself, constitutes a major life activity); *Acevedo Lopez v. Police Department of Puerto Rico*, 81 F.Supp. 2d 293, 297 (D.P.R. 1999), affirmed on other grounds, 247 F.3d 26 (1st Cir. 2001) (Court found "significance of driving is simply not on par with those basic, essential human functions that are within the contemplation of the ADA, such as caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working.")

---

[2] In *Anderson v. North Dakota State Hospital,* 232 F.3d 634, 636 (8th Cir. 2000), the Eighth Circuit Court of Appeals had an opportunity to make a definitive decision as to whether driving was a major life activity under the ADA. However, that Court declined to do so, and merely "assumed" that driving was a major life activity, without specifically deciding the issue. However, the court denied any relief to the claimant.

The Respondent brings these cases to the Court's attention because Petitioner makes reference, at page 18 of her brief, to *Arnold v. County of Cook*, 220 F.Supp. 2d 393, 395 (N.D. Ill. E. Div. 2002) citing it as a decision which conflicts with the Tenth Circuit's decision in this case. The *Arnold* Court did state, "This court notes that there are compelling reasons to think that driving should qualify as a major life activity. Driving appears to be of central importance to most person's daily lives. . . ." *Arnold, supra* at 895, footnote 3. However, in 2005, that same court (Northern District of Illinois), in the same division (Eastern Division), reversed itself and held in *Yindee v. Commerce Clearinghouse, Inc.*, No. 04 C 0730, 2005 WL 1458210 (N.D. Ill. June 16, 2005) (unpublished), that driving "in and of itself is not of central importance to daily life on par with activities such as seeing, hearing, or working in broad class of jobs so it is not a major life activity as that term is used in an ADA context."

Petitioner cites, at page 18 of her brief, *Endlich v. Yellow Corp.*, No. 05-2215, 2006 WL 1520177 at * 3 (10th Cir. June 2, 2006) (unpublished) for the proposition that the Tenth Circuit's decision in this case is inconsistent with a holding from a court within the Tenth Circuit. Petitioner states that "the Tenth Circuit listed reaching, throwing, lifting or driving as major life activities." However, a review of that case demonstrates the Tenth Circuit did not make such a listing as a holding or decision. The listing was merely a recitation of Endlich's allegations, upon which he failed to present evidence. The paragraph from which the phrase was extracted states:

> Endlich has not cited any record evidence to support his assertion that Yellow regarded him as being substantially limited in the major life activities of reaching, throwing, lifting or driving. Neither does he offer any record evidence in support of his position that Yellow regarded him as substantially limited in the major life activity of working. The only record citation he provides is for the fact that Endlich won his contested workers' compensation hearings. That information simply does not provide any support for his claim that *Yellow* regarded him as substantially limited in the major life activity of working." (Emphasis added)

Endlich, supra, at *3.

At page 19 of her brief, Petitioner states: "[A]t least one court has held that driving could be considered a major life activity in a certain area. *Norris v. Allied-Sysco Food Services, Inc.*, 948 F.Supp. 1418 (N.D. Cal. 1996) ("[A]t least in California, driving is a major life activity.")" That is a misstatement of the law. In *Norris*, the court was not specifically requested to determine whether driving is a major life activity, and the court did not specifically make such a determination or holding. The *Norris* Court was addressing a motion for judgment as a matter of law, after a verdict for the employee. The *Norris* Court stated, at page 1434: "In this case, the jury easily could have concluded from the evidence that Norris had a back injury which substantially limited her ability to perform the major life activity of lifting." The *Norris* Court went on to state, in footnote 13, at page 1434:

> The jury also could have concluded that Norris' back injury substantially limited her ability to drive, and a jury could have reasonably felt that, at least in California, driving is a major life activity.[3]

Petitioner seeks to elevate driving, in and of itself, to the status of a major life activity instead of treating the inability to drive in the manner in which all other courts have done– as one factor to be considered, in conjunction with other evidence, as to whether a person is substantially limited in the major life activities of caring for oneself or working or performing manual tasks. Petitioner has failed to cite any decision of any court which has expressly held that driving, in and of itself, is a major life activity under the ADA. There is no conflict between the Tenth Circuit's decision in this matter and that of any other court of appeals.

---

[3] In the Tenth Circuit, the question of whether driving is a major life activity would never have been determined by a jury. In *Berry v T-Mobile USA, Inc.*, 490 F.3d 1211 (10th Cir. 2007) the Court stated:

> Whether the Plaintiff has an impairment within the meaning of the ADA and whether the conduct affected is a major life activity for purposes of the ADA are questions of law for the Court to decide. Ascertaining whether the impairment substantially limits the major life activity is a question of fact for the jury, although a court is not precluded from deciding the issue on a motion for summary judgment.

II. The Tenth Circuit's decision is consistent with this Court's opinion in *Toyota Motor Mfg., Ky., Inc. v. Williams.*

Petitioner asserts the Tenth Circuit's decision that driving is not a major life activity under the ADA, is inconsistent with this Court's decision in *Toyota Mfg., Ky., Inc. v. Williams,* 534 U.S. 184 (2002) because the Tenth Circuit did not engage in an analysis of whether driving was of central importance to daily life. Petitioner then argues, at page 25 of her brief, that this Court should adopt a blanket rule that "driving is a major life activity in rural areas"–a rule which would eliminate the necessity of engaging in an analysis of whether driving is of central importance to daily life.

Contrary to Petitioner's assertions, the Tenth Circuit did engage in an analysis of whether driving was of central importance to daily life. The Court stated, at page 1125:

> It cannot be disputed that driving is an extremely important daily activity to many, even most, adults. Without the ability to drive, it may be very difficult to care for oneself or to work. Indeed, we have recognized that the activity of "[c]aring for one's self encompasses normal activities of daily living; including . . . driving. . . ." *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 767 (10th Cir. 2006) (internal quotation marks omitted)."

And again, at pages 1125-26, when the Tenth Circuit stated:

> Moreover, the importance of the enumerated activities is not dependent on where one lives; they are valued as much by the resident of a major metropolitan area as by an isolated rural resident. Driving, in contrast, may be a minor concern for one who is near convenient mass transit and can walk to work.

The Tenth Circuit recognized that to conclude that driving, in and of itself, was a major life activity, would short circuit the analysis (required by *Toyota)* of whether one of those major life activities had been substantially limited. It also recognized that such a rule would allow a claimant to bypass having to prove substantial limitations in these major life activities by providing only evidence that a person cannot drive.

The blanket rule sought by Petitioner that driving is a major life activity in rural areas would be inconsistent with a *Toyota* analysis. In *Toyota,* this Court recognized that "the determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis." A blanket rule that driving is a major life activity for persons who live in Wyoming or rural areas would be inconsistent with the "case-by-case analysis of the impact" required by *Toyota.* Such a rule would also create confusion (and litigation) as to which states or areas are "rural" so as to have the advantage/disadvantage of the reduced burden of proof. There would also be confusion (and litigation) as to whether the blanket rule that Petitioner seeks applies when a state/area has both metropolitan components with public transportation (such as Cheyenne, Wyoming, or New York City) as well as

rural areas with no public transportation (such as Worland, Wyoming, and Upstate New York).

Finally, Petitioner has presented no cogent authority for applying the ADA differently depending on the geographic area. ADA is a federal law that is not defined, restricted or enhanced by geographic location. Treating the inability to drive in the manner described by the Tenth Circuit in its decision (and as it historically has been done)–as evidence which can, on a case-by-case basis, be considered in determining whether a person is substantially impacted relative to caring for oneself, performing manual tasks, or working-- avoids these issues and more, and is consistent with existing law.

III. The Tenth Circuit's opinion is consistent with the law in effect at the time of the alleged discrimination against Petitioner and is consistent with the newly adopted, though not applicable, ADA Amendments of 2008.

Petitioner's claim arose in 2005. The law in effect at that time, and applied to her claim, was the Americans with Disabilities Act of 1990. The Americans with Disabilities Act as Amended by the ADA Amendments Act of 2008 became effective on January 1, 2009. Petitioner, at pages 26 through 31 of her brief, argues this new law should/would be applicable to this matter. Such a proposition violates Section 9 of the United States Constitution, which provides ". . .no ex post facto Law shall be passed."

Even if those provisions were applicable, it should be noted that Congress had an opportunity, and, in

fact, did adopt and expand the list of major life activities to correct situations where it felt the courts had not properly construed the law in accordance with Congress' intent. *See* ADA Amendments Act of 2008, Pub.L.No. 110-325, Sept. 25, 2008, Section 2 (a)(3),(4),(5),(6),(7), and (8); (b)(2),(3),(4), and (5). Congress specifically adopted a statutory definition of major life activities, and added specific provisions concerning major bodily functions. 42 U.S.C. 12102(2)(A),(B). It did not add "driving" to the list of major life activities, although it could have, if that was what was intended.

The fact Congress did not add "driving" to the list of major life activities means the inability to drive continues to be treated in the manner in which it has historically been treated, which is the manner described by the Tenth Circuit, *i.e.*, as evidence which can, on a case-by-case basis, be considered in determining whether a person is substantially impacted relative to caring for oneself, performing manual tasks, or working. That was the law in effect at the time Kellogg's claim arose, and the decision of the Tenth Circuit Court of Appeals is consistent with that law.

CONCLUSION

The decision of the Tenth Circuit Court of Appeals does not conflict with a decision of this Court or the decision of any United States court of appeals. The Tenth Circuit's decision does not implicate an important question of federal law that has not been, but should be, settled by this Court. The Tenth Circuit's decision does not implicate an important federal question in a way that conflicts with relevant

decisions of this Court. Petitioner has not carried her burden of demonstrating any compelling reasons for the Petition to be granted as required by Supreme Court Rule 10.

Therefore, Respondent respectfully requests the Petition be denied.

Respectfully submitted,

Catherine MacPherson, Of Counsel
Counsel of Record
Thomas A. Thompson
MacPherson, Kelly & Thompson, LLC
616 West Buffalo Street
Box 999
Rawlins, WY 82301
Ph: 307-324-2713